

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN KEITH HARVEY,

Petitioner,

Case No. 1:04-cv-35

v

Hon. Wendell A. Miles

CURT JONES, Warden,

Respondent.

ORDER ON PETITIONER'S "MOTION TO BE FILED UNDER NEW EVIDENCE"

This is a habeas corpus action brought by a Michigan prisoner pursuant to 28 U.S.C. § 2254.¹ On August 8, 2008, the court entered its judgment in the matter denying the petition for writ of habeas corpus. The matter is now currently before the court on a motion by petitioner titled "Motion to be Filed Under New Evidence" (docket no. 56). In his motion, petitioner seeks an evidentiary hearing on issues related to what he contends was the underrepresentation of African-Americans on venire panels in the county where petitioner's trial was held.

In support of his motion, petitioner relies on a case decided after the court issued its ruling in this case. Although petitioner does not provide a cite for the case, he appears to be referring to Smith v. Berghuis, 543 F.3d 326 (6th Cir. 2008), decided in the Sixth Circuit on September 24, 2008. In Smith, the court held that the petitioner had established a violation of his

¹When petitioner filed his habeas petition, he was incarcerated at Michigan's Carson City Correctional Facility, where, he alleged, Curt Jones was his warden. However, petitioner currently is confined at Ojibway Correctional Facility.

Sixth Amendment rights by demonstrating that underrepresentation of African Americans on Kent County, Michigan's venire panels was a result of systematic exclusion.

Petitioner cites to no procedural basis for his motion, made after the court has already issued its judgment in this matter on the claims raised in the petition. The two claims which petitioner seeks to develop through the present motion – Sixth Amendment claims related to the composition of the venire panel and jury and counsel's failure to raise these issues – were not asserted in the petition. It is simply too late for petitioner to attempt to raise new claims now as part of this case.

Because the issues raised by petitioner in his motion are not related to the claims made in the petition filed in this case, the motion is **DENIED**.

So ordered this 30th day of December, 2008.

/s/ Wendell A. Miles
Wendell A. Miles, Senior Judge